IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 598 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAJOTHI ASMADBHAI ISMAILBHAI

Versus

STATE OF GUJARAT

Appearance:

MR EE SAIYED for Petitioners

MR BD DESAI A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 27/01/2000

ORAL JUDGEMENT (Per : H.R. SHELAT, J)

The appellant, after being convicted of the

offence punishable under Sec.302 read with Sec. 34 of I.P.C., and sentenced to life imprisonment by the then Additional Sessions Judge at Morbi on 20th May, 1992 in Sessions Case No.10/90, has preferred this appeal calling in question the legality and validity of the conviction and sentence inflicted.

2. Necessary facts may in brief be stated.
Isabhai Daudbhai, the complainant and his uncle Ibrahim Khamisa, the deceased had gone to see movies on 13th January, 1990 during the last show from 9.00 p.m. to 00.00 a.m. After the show was over, he and the deceased were going back to their residence riding over the cycle. The deceased was driving the cycle while he was the pillion ridder. When both reached near culvert in Boricha-vas at 0.30 a.m. where there is a street light pole, both the appellants were found running towards them amok. The appellant No.1 was armed with an axe, while respondent NO.2 was armed with a Scythe. The appellant NO.2 gave Scythe blow to Ibrahim Khamisa (deceased) on his head. He, therefore fall down from over the cycle. In order to save himself he tried to run towards the end of the culvert. The appellant NO.1 then chased him and gave the axe blow on his head and the blade of the axe got stuck into head. Leaving the axe there, both the appellants then ran away. Isabhai Daudbhai, went to the nearby place of Ramzanbhai and Husenbhai, his uncles. He informed Ramzanbhai, Amnaben and Husenbhai. Along with those three, he went back to the scene of incident where the deceased was lying. They found that the deceased had sustained injury on the head. There was a pool of blood and axe which had stuck into the head was then drawn out. The deceased was then taken to the hospital by Rickshaw which was passing at that time by that place. During the course of the treatment, Ibrahim Khamisa died. A complaint was then lodged with Morbi City Police Station. At the conclusion of the investigation, a Chargesheet was filed in the Court of the Judicial Magistrate, First Class at Morbi. The learned Judicial Magistrate of that Court was not competent to hear and decide the case of murder. He, therefore, committed the same to the Court of Sessions at Rajkot which came to be registered as Sessions Case NO.10/90. The then learned Sessions assigned the same to the then learned Additional Sessions Judge at Morbi who framed charge against both the appellants. They pleaded not guilty and claimed to be tried. The prosecution then led necessary evidence. Considering the evidence before him, the then learned Additional Sessions Judge at Morbi, reached the conclusion that the prosecution had succeeded beyond reasonable doubt in establishing the charge

levelled against the appellants. He, therefore, held both the appellants guilty of the offence punishable under Sec.302 read with Sec.34 of I.P.C. and sentenced them as aforesaid. It is against that order of conviction and sentence, the present appeal is filed.

3. Before we proceed, it may be stated that the learned advocate Mr. Saiyed representing the appellants states on the information he received from the learned advocate Mr. Gul-Hamid Saiyed that the appellant NO.1 died during the pendency of the appeal, and therefore, the appeal now remains to be decided so far as it relates to the appellant No.2. Of course, he did not have the Death Certificate. He has, therefore, not tendered the same. We will now consider the merits of the rival contentions.

4. The learned advocate for the appellant contents that because of the enmity, the appellants were involved, though they committed no wrong and the complainant Isabhai Daudbhai also because of inimical terms states against the appellant. The contention cannot find favour. During the course of the investigation, the police could seize the weapons used for committing the wrong and also seized clothes put on by the appellants. It may be stated that the blood group of the deceased was `B'. When the weapons namely the axe and Scythe and clothes were sent to the Forensic Science Laboratory for analysis the Assistant Chemical Analyser on analysis found that on the axe as well as Scythe human blood was found and the blood thereof was `B'. Likewise, on the Kurta of the appellant No.1 and on the Bush-shirt of the appellant NO.2 human blood marks were found and group thereof was also `B'. Thus, on the weapons the appellants were having and on the clothes they had put on at the time of incident, blood marks of group `B' were found which was the blood group of the deceased. This is the strongest circumstance on record supporting the case of the prosecution. It is, in this circumstances, for the appellant to explain how the blood of the deceased could be found on their clothes and weapons they were having. No explanation is offerred. In absence of any explanation, on the basis of aforesaid circumstance, carrying much weight establishing the involvement of the appellants, the contention advanced, cannot be accepted.

5. There may be enmity, but Court cannot jump to the conclusion that because of the enmity, the witness is telling a lie. It is also possible that because of the enmity, someone would like to tell the truth when he had in fact seen the incident. The above discussed

circumstance, namely blood marks having been found on the clothes also supports the say of the complainant and it negatives the submission that because of the inimical terms, he is telling a lie.

6. It is also the contention of the appellant that the say of the complainant cannot be accepted because he, instead of going to the Police Station goes to the place of Ramzanbhai and under the pretext of informing they planned out a case against the appellants and involved them. The contention is misconceived. The evidence of the witness cannot be disbelieved or brush aside only on the ground that he ought have behaved in a particular manner the party making submission thinks it wise and proper than the manner in which he behaved, because at that particular point of time, one may react according to his insight, estimation, perception, notion or risk involved or immediate necessity at the spot and prefer what to do first out of several ways available. In this case, the complainant Isabhai Daudbhai instead of going to the Police Station, thought it wise to take the help of his relative who were residing in the neighbourhood, so that immediate medical treatment can be given to the deceased in order to save him. If thinking accordingly, he had prefer to go to the place of Ramzanbhai rather than going to the Police Station, his say cannot be discarded holding that his conduct was strange and not natural, as sought to be contended.

7. It is also the contention that Isabhai Daudbhai is blind by one eye, and his another eye, according to the appellant, is weak. The vision of that eye is weak. He could not have therefore seen the assailant clearly, and because of the inimical terms, they were involved. Of course, by only one eye Isabhai Daudbhai was able to see, but there is no evidence whatsoever on record indicating that his another eye is having weak vision, consequently, he could not have seen the incident properly, and possibility of involvement by chance or likelihood or owing to mistaken identity cannot be ruled out. Even by one eye one can see clearly and properly. In the absence of any evidence indicating weak vision of another eye, the contention cannot be accepted.

8. The Panchas have not supported the case. They are, hence, declared hostile. If the Panchas relating to the scene of offence or seizure of weapons are turned hostile, the prosecution can even succeed on the other reliable and credible evidence, may be of one witness. In the case on hands, the evidence of Isabhai Daudbhai inspires confidence and when we perused the same, we

found that it is free from inherent improbabilities and no fault can be found with the same. He is also, supported by the report of Forensic Science Laboratory and at this stage, we may mentioned that he is also supported by the evidence of the Doctor who performed Post-mortem who has stated that two injuries which he saw on the head injuring the brain were possible by the scythe and the axe blow, and each the injuries individually was sufficient in ordinary course of nature to cause death. When the prosecution thus finds support from such other reliable evidence which is sufficient to establish the charge beyond reasonable doubts, hostility of the Panchas is not fatal to the prosecution.

9. In the F.I.R. Isabhai Daudbhai has stated that some of the persons were on the road, because after the cinema show was over, the Cinegoers were returning but the evidence of the prosecution or Isabhai Daudbhai cannot be doubted as contended only on the ground that no one out of those Cinegoers and passing by the road is examined in support of the case. The prosecution has to decide what evidence should be lead. Of course, the prosecution must be honest in selecting the witnesses. The prosecution is not bound to examine those witnesses who have not seen the incident, and whose evidence would through no light on the proposition. If the contention is raised that someone out of the persons passing by the road ought to have been examined, it must be shown from the materials on record that one of those was knowing about the incident as he had seen it and was able to throw light on the proposition. If that does not appear on record, non-examination of such persons, will never be fatal. In the case on hands, we have gone through the evidence carefully and we do not find anything indicating that those who were returning from the Cinema and were going to their respective houses, or one of them, had seen the incident and was able to through light on the proposition. With regards to his contention, when a quarry was made, the learned advocate for the appellant failed to point out anything from the material on record that one of those Cinegoers would have thrown light on the proposition. In view of the matter, the contention advanced, must fail.

10. When the deceased was taken to the hospital, the case papers were prepared at that time. The Doctor had asked how the injury came to be sustained to which Isabhai Daudbhai, the complainant replied that assaulted by axe and the Doctor then noted that "assaulted with axe". Mr. Saiyed learned advocate for the appellant, therefore, contends that the Court may hold that there

was no assault by Dhariya. If at all that was so, the complainant would have stated about the same involving the appellant No.2. When at the first point of time, the appellant NO.2 is not involved, the case of the prosecution is not free from doubt; and whatever doubt that arises, benefit of the same must go to the appellant. The contention cannot be accepted because the Doctor has noted two injuries. The Diagram of the injuries is also given on the last page of the papers (Ex.27). One injury is vertical 5 inches in length, while another is horizontal six inches in length, and both the injuries makes a shape of inverted `T'. The Doctor has also opined that one injury is possible by Axe blow and another by scythe blow. Considering the evidence of the complainant who is the only eye witness, it can be said that the horizontal injury is caused by scythe blow and vertical injury is caused by the axe blow. When these two injuries, of which one can be caused by scythe and another by the axe were found by the Doctor, the omission to mention about the scythe blow injury before the Doctor or Doctor's lapse in that regard is nothing but the inadvertence and it may be because of the consternation, confusion or disconcertment owing to poignant incident. The contention therefore cannot find favour.

11. With the assistance of both the learned advocates, we have carefully gone through the entire evidence on record and we generally agree with the reasonings of learned Additional Sessions Judge. When that is so, it is not necessary to restate all those reasonings and hold that the learned judge was perfectly right on all the issues and in convicting and sentencing the appellants. However, it may be stated that the evidence of the complainant is supported by the evidence of the Doctor, is sufficient to hold that the prosecution has, beyond reasonable doubt, succeeded in establishing the charge of murder levelled against both the appellants. Faced with such situation, Mr. Saiyed learned advocate representing the appellant submits that the learned Additional Sessions Judge ought not to have convicted the appellants for the offence of murder but ought to have convicted for the lesser offence namely offence under Section 304 Part 1 or Part 2. The contention must fail, as the appellants get nothing on record in support of such contention and have the benefit they want. If there are more than one accused and all give blows with the weapons they are having, and cause injuries; and it is difficult to say which injury was fatal; but cumulative effect of all the injuries was fatal, no one can specifically be blamed for murder,

instead of convicting the accused of the offence of murder u/S.302, they can be convicted under Sec.304 Part 1; and the person causing fatal injury can on clear and specific proof regarding nature of injury be convicted for the offence of murder punishable under Sec.302 I.P.C. It may be stated that if the guilt is fully proved and conclusive in nature and involvement is not on the basis of hypothesis of guilt and the evidence on record is inconsistent with innocence of accused or other possibility, the accused cannot be convicted for the lesser offence punishable under Sec. 304 Part I or Part II. We find from the record that there was enmity between the two families. At mid-night both the appellants armed with deadly weapons had gone out to assault and cause hurt on the vital part which may be sufficient to cause death. It is not the case that suddenly both met on the road and because of scuffle, altercation and pell-mell that took place, unfortunately death was caused. It is also not the case that because of the sudden provocation or because of sudden fight, the unfortunate incident happened. Here from the facts stated hereinabove, it appears that after due deliberation or plan both the appellants, taking deadly weapons had gone out somehow getting information that the deceased was to return from cinema house after show was over. This fact on the record on the contrary shows the intention of the appellants was to kill the deceased. It may also be mentioned that each of the injuries individually was sufficient to cause the death in ordinary course in nature, is the opinion of expert i.e. Doctor. It is not the opinion of the Doctor that cumulative effect of both the injuries was sufficient to cause death and either of the injuries alone was not sufficient to cause the death. Both the appellants have caused the injuries and each being sufficient in ordinary course of nature to cause death, the intention is clear and that is to commit murder and not homicidal death not amounting to murder; and that gives no scope to the possibility of the act having been done with the knowledge that it is likely to cause death. It may also be mentioned that after the first blow was given, the appellant chased and second blow was also given, so that there might not be any possibility of his survival and that also shows the intention to cause death. In view of the fact, the contention advanced, cannot be accepted.

12. On no other ground, submissions are made. In view of that what we have said hereinabove, there is no reason to interfere with the findings and order of conviction and sentence inflicted by the lower court. The appeal is devoid of merits and the same is required

to be dismissed and is accordingly dismissed maintaining the order of conviction and sentence inflicted.

****

rafik